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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. [redacted] 10

OCEAN BEACH HEIGHTS, INC., A CORPORATION; NORMANDY BEACH DEVELOPMENT COMPANY, A CORPORATION; LUCILLE F. ENSIGN AND HER HUSBAND, WALTER C. ENSIGN, AND TATUM'S OCEAN PARK COMPANY, A CORPORATION,

Petitioners,

vs.

THE BROWN-CRUMMER INVESTMENT COMPANY, A KANSAS CORPORATION, AND TOWN OF NORTH MIAMI, A MUNICIPAL CORPORATION; DANA W. ROBBINS AS MAYOR OF SAID TOWN, J. H. GRIBBLE AS TAX COLLECTOR AND TAX ASSESSOR OF THE SAID TOWN, MRS. E. MAY AVIL AS CLERK AND TREASURER OF THE SAID TOWN, AND E. C. HARNER, MRS. CECILLE SEVIER, MRS. ELLA F. KLEFEKER, D. D. AVIL AND H. W. JONES AS MEMBERS OF THE TOWN COUNCIL OF SAID TOWN.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 787

OCEAN BEACH HEIGHTS, INC., A CORPORATION; NORMANDY BEACH DEVELOPMENT COMPANY, A CORPORATION; LUCILLE F. ENSIGN AND HER HUSBAND, WALTER C. ENSIGN, AND TATUM'S OCEAN PARK COMPANY, A CORPORATION,

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vs.

THE BROWN-CRUMMER INVESTMENT COMPANY, A KANSAS CORPORATION, AND TOWN OF NORTH MIAMI, A MUNICIPAL CORPORATION; DANA W. ROBBINS AS MAYOR OF SAID TOWN, J. H. GRIBBLE AS TAX COLLECTOR AND TAX ASSESSOR OF THE SAID TOWN, MRS. E. MAY AVIL AS CLERK AND TREASURER OF THE SAID TOWN, AND E. C. HARNER, MRS. CECILLE SEVIER, MRS. ELLA F. KLEFEKER, D. D. AVIL AND H. W. JONES AS MEMBERS OF THE TOWN COUNCIL OF SAID TOWN.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Honorable the Supreme Court of the United States:

The petitioners respectfully show:

This is a petition for review on certiorari of the final decree of the Circuit Court of Appeals for the Fifth Judicial Circuit, of January 22, 1937 (not yet reported), whereby,

by a divided court, the final decree rendered by District Judge Halsted L. Ritter, Southern District of Florida, at Miami, on February 10, 1936 (R. 390), was affirmed; and for review of the decree of the Circuit Court of Appeals, of February 5, 1937; denying a petition for rehearing.

On June 19, 1931, The Brown-Crummer Investment Company recovered in the District Court a common law judgment against the Town of North Miami, in Dade County, Florida, immediately north of the City of Miami, on certain improvement bonds of the Town issued in 1927 and 1928.

On December 1, 1934, on bill filed by The Brown-Crummer Investment Company (R. 1), answer of Ocean Beach Heights, Inc., (R. 64), answers of other defendants (R. 105), and on evidence taken (R. 126), the District Court enjoined (R. 390) the officers of the Town of North Miami from refusing to levy and collect taxes on the lands of Ocean Beach Heights, Inc., east of Biscayne Bay, and on other lands east of Biscayne Bay; and also enjoined Ocean Beach Heights, Inc., and other owners of lands east of Biscayne Bay, from interfering with the town officers in levying and taxing such lands, and from contesting by judicial proceedings the levy and collection of such taxes, and from contesting by judicial proceedings old tax certificates for the nonpayment of taxes assessed for bonded indebtedness, and from availing themselves of the decision of the Supreme Court of Florida, of March 21, 1934, in the case of *Leatherman et al.* v. *Alta Cliff Company et al.,* 114 Fla. 305, 153 So. 845. In that case, involving the same lands involved in the instant case, the Supreme Court of Florida held that the lands were never, *de jure* nor *de facto,* in the Town of North Miami, and were never subject to taxation by the Town, and cancelled assessments made for the years 1927, 1928, 1929 and 1930.

The *Alta Cliff* case followed the decision in the *quo warranto* proceeding of *Mahood et al.* v. *State ex rel. Davis;*

Attorney General, et al., 101 Fla. 1254, 133 So. 90, decided on March 24, 1931, and followed by a judgment of ouster, December 18, 1931, in the court of first instance, as to the lands involved in the instant case.

The *Alta Cliff* case and the *Mahood* case were bottomed on the decision in the case of *Town of Enterprise et al.* v. *State*, 29 Fla. 128, 10 So. 740, decided March 16, 1892, in which the Supreme Court of Florida settled the law of the State to the effect that the statutes of the State, providing for the organization of a town by mass meeting of as few as 25 persons, do not authorize a mass meeting to include in the same town noncontiguous lands.

Sections 1825, 1826, 1827 and 1828 of the Revised General Statutes of Florida (1920), printed in full in the appendix to this petition, and in force in 1926, when the Town was organized purportedly under the provisions of those sections, authorize a mass meeting of qualified electors, not fewer than 25 in number, residing in "any *hamlet, village or town,*" to assemble in mass meeting and organize an incorporated town under the general municipal incorporation statutes.

On February 5, 1926, 38 qualified electors (R. 92) residing in "a hamlet or village" west of Biscayne Bay, and immediately north of the City of Miami, assembled in mass meeting and organized a town named "Town of Miami Shores," later named "North Miami." But, in defining the boundaries of the town, the mass meeting took in 16½ square miles of territory (R. 137), including a part of Biscayne Bay and a substantial area of undeveloped lands east of Biscayne Bay and along the Atlantic Ocean, on which less than a dozen people lived. (R. 135).

The petitioners own lands east of Biscayne Bay, 10 miles by travel from the center of the "hamlet or village" west of Biscayne Bay where the mass meeting was held and the town organized.

The question presented to the Circuit Court of Appeals for decision was,

WOULD THAT COURT FOLLOW THE DECISION OF THE SUPREME COURT OF FLORIDA, IN LEATHERMAN ET AL., *v.* ALTA CLIFF COMPANY, HOLDING THAT THE LANDS IN QUESTION WERE NEVER, DE JURE NOR DE FACTO, IN THE TOWN, AND, THEREFORE, NEVER SUBJECT TO TAXATION BY THE TOWN OFFICIALS, FOR THE VERY GOOD REASON THAT THERE WAS NEVER ANY LAW IN FLORIDA THAT AUTHORIZED THE INCLUSION OF SUCH LANDS IN THE BOUNDARIES OF THE TOWN?

Circuit Judge Sibley, in an able dissenting opinion in the instant case, held that the law of Florida, as fixed by Florida statutes, and repeatedly interpreted by the Supreme Court of Florida, withheld from the mass meeting of 38 electors power to span Biscayne Bay and take into the Town of North Miami the lands east of the Bay, and that the Circuit Court of Appeals was bound by the decision of the Supreme Court of Florida in *Leatherman et al.* v. *Alta Cliff Company,* because that decision was one interpreting Florida statutes respecting the powers and duties of municipal officials—creatures of State statutes, whose source of power is the State statutes.

Circuit Judge Hutcheson, speaking for himself and for Circuit Judge Foster, in the instant case, refused to follow the Supreme Court of Florida, in *Leatherman et al.* v. *Alta Cliff Company,* and gave as a reason that the holding of the Supreme Court of Florida, in that case, that the lands east of Biscayne Bay were never *de facto* in the town, was not necessary to the decision of the case.

An unfortunate result of the decision of the Circuit Court of Appeals is that E. B. Leatherman, as Clerk of the Circuit Court of Dade County, is enjoined *from refus-*

ing to issue tax deeds based on assessments by the town officials for the years 1927, 1928, 1929 and 1930, while he is enjoined by the Supreme Court of Florida, in the *Alta Cliff* case, *from issuing* tax deeds pursuant to the identical assessments.

Review by this Court is asked for the following reasons:

1. The Circuit Court of Appeals, in the majority opinion, by refusing to follow the Florida case of *Leatherman et al. v. Alta Cliff Company*, has decided an important question of local law in a way probably in conflict with applicable local decisions.

2. The Circuit Court of Appeals, in the majority opinion, has decided an important question of general law in a way probably untenable and in conflict with the weight of authority.

Accompanying this petition are the following mentioned documents:

(a) A certified transcript of the record of the case, including the proceedings in the Circuit Court of Appeals;

(b) Ten copies of the record of the case as printed below, together with the proceedings and opinions of the Judges of that Court;

(c) Forty printed copies of this petition and the supporting brief.

WHEREFORE, your petitioners pray that a writ of certiorari may issue out of, and under the seal of, this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Judicial Circuit, requiring that the said cause be certified to this Honorable Court for review and determination, and that your petitioners may have such

other and further relief in the premises as to this Honorable Court shall seem appropriate and in conformity with the laws of the United States.

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BRIEF.

Leatherman et al. v. *Alta Cliff Company et al.*, 114 Fla. 305, 153 So. 845, was decided by the Supreme Court of Florida on March 21, 1934. It involved the validity of taxes assessed by the Town of North Miami, against lands east of Biscayne Bay, for the years 1927, 1928, 1929 and 1930. It was contended in that case by Ocean Beach Heights, Inc., and other owners of lands east of Biscayne Bay, that, under the decision of *Mahood et al.* v. *State ex rel. Davis, Attorney General, et al.*, 101 Fla. 1254, 133 So. 90, decided March 24, 1931, followed by the entry of a judgment of ouster on December 18, 1931, in the Circuit Court of Dade County, as to the lands east of Biscayne Bay, the assessments were made without lawful authority. and therefore, void, because such lands were never in the town. The Supreme Court of Florida upheld the contention.

Circuit Judge Sibley, in his dissenting opinion, held that the *Alta Cliff* case was controlling in the instant case.

Circuit Judges Hutcheson and Foster refused to follow the *Alta Cliff* case on the ground, as stated in the prevailing opinion of Judge Hutcheson, that it was not necessary, in 1934, for the Supreme Court of Florida to decide that the decision of the Supreme Court in the *Mahood* case and the judgment of ouster, in 1931, were authority for holding void taxes assessed for the years 1927, 1928, 1929 and 1930, because the assessed lands were never in the town.

Since the contested taxes were for years *anterior* to the decision in the *Mahood* case and the judgment of ouster, it would seem to follow that the Supreme Court of Florida was necessarily required to determine whether the decision in the *Mahood* case and the judgment of ouster spoke *only in futuro*, as Judges Hutcheson and Foster thought, or looked backward as well as forward, as Ocean Beach Heights, Inc., and others contended, and as the Supreme Court of Florida decided.

The question as to the effect of the decision in the *Mahood* case and the judgment of ouster on the *antecedently* assessed taxes against the lands east of Biscayne Bay, was one for the Supreme Court of Florida. When that court decided the effect of its previous decision, it was left to the Circuit Court of Appeals only to follow the interpretative decision.

In *Hawks* v. *Hamill,* 288 U. S. at page 52, 77 Law Ed. at page 617, this Court observed that the Federal courts should follow "the considered dictum" of a State Supreme Court on a local question. That case was one reviewed on certiorari to a Circuit Court of Appeals.

Norton v. *Shelby County,* 118 U. S. 425, 30 Law. Ed. 178, is, in our opinion, very much in point here.

As pointed out in the petition for review on certiorari, the *Alta Cliff* case and the *Mahood* case are bottomed on the case of *Town of Enterprise et al.* v. *State,* 29 Fla. 128, 10 So. 740, decided as far back as March 16, 1892.

It has long been established law in Florida that a municipality may not have a *de facto* existence unless there be a law authorizing its creation.

Duke v. *Taylor,* 37 Fla., 64, 19 So. 172, 31 L. R. A. 484, 53 A. S. R. 232.

Such is the general rule of law.

8 Fletcher Cyclopedia Corporations, Section 3785, page 79;

Norton v. *Shelby County,* 118 U. S. 425, 30 Law Ed. 178.

And so, in the *Alta Cliff* case, the Supreme Court of Florida decided that the lands east of Biscayne Bay were never *de facto* in the Town of North Miami, because there never was a law authorizing the inclusion of such lands in the town.

A brief review of the Florida cases cited in the opinion of Judge Hutcheson, to support his conclusion, may not be amiss.

In *State ex rel. Fidelity Life Ass'n* v. *City of Cedar Key et al.,* 122 Fla. 454, 165 So. 672, the officers of the City, respondents in a mandamus proceeding to force collection of taxes to pay bonds, *attempted to deny the existence of the City* that issued the bonds, which had been judicially and legislatively validated; and the existence of the City having been implicitly recognized by a legislative act of 1917 (see top of page 676, 165 So.). The City officers attempted to repudiate the bonds on the ground that, in a *quo warranto* proceeding by two property owners, in the Circuit Court, the court held *the City* unlawfully created. The Supreme Court of Florida held that the City officers could not repudiate the bonds on the strength of the judgment of ouster of the City obtained by the two property owners. The court, however, in the concluding paragraph of its opinion, *saved the rights of individual property owners who might be able to show that their lands were never lawfully included in the City.* In the instant case, there is no attempt to deny the existence of the Town of North Miami, and the validity of the bonds issued by the Town is not questioned, and the officers of the Town are not opposing payment of the bonds. What we have here is just exactly what the Supreme Court of Florida referred to in the concluding paragraph of its opinion, namely, *individual property owners* setting up that their lands *never were lawfully in the Town* of North Miami, and they are supporting their contention with the *Alta Cliff* case, precisely in point.

In *City of Winter Park* v. *Dunblaine, Inc.,* 121 Fla. 600, 164 So. 366, a bondholder sued the issuing City on its bonds. The City asked, and was refused leave, to file a plea alleging generally that *the bonds were not issued for a municipal purpose,* but for the purpose of improving wild lands and

aiding private individuals and corporations which owned the lands. Held, plea too general, set up no defense, no error in refusing leave to file it.

In *State ex rel. Landis, Attorney General et al.* v. *City of Coral Gables,* 120 Fla. 492, 163 So. 308, the *legislature had defined the boundaries of the City,* in which the property owner acquiesced for six or eight years, during which time large sums of money were loaned to the City and many public improvements constructed on the faith of the validity of the legislative act defining the boundaries of the City. Held, in *quo warranto* proceedings by a property owner, who claimed that his lands received no benefits by being in the City, that he was estopped by delay and acquiescence.

In *Sparks et al.* v. *Ewing et al.,* 120 Fla. 520, 163 So. 112, there was involved *the validity of a bond issue* by the City of Hialeah, issued without a vote of the people, under special charter provision claimed to dispense with a vote of the people. The bonds had been judicially validated. Held, the Constitution did not require a vote of the people, and that, in the validation proceeding, the court had implicitly, at least, held the bonds validly issued, and that such validation proceedings foreclosed the question as to *the validity of the questioned bonds.*

We shall touch briefly on some of the points emphasized in the prevailing opinion of Judge Hutcheson, for the purpose of demonstrating that the learned Judge stressed points of no significance under Florida law.

It was erroneous to recite in the opinion, "* * * the proposed corporate limits as set out in the * * * bonds as fixed in forming the town, definitely included that east of the bay." In fact, the bonds do not purport to recite the boundaries of the town.

Because the Supreme Court of Florida, in the *Alta Cliff* case, disclaimed any intention of determining whether the

legislature might include in one town lands separated by Biscayne Bay, under the circumstances surrounding the organization of North Miami, by mass meeting, because that question was not involved in the case, does not warrant the inference, if it be important, that the court would uphold such an Act. In *State* v. *Stuart,* 97 Fla. 69, 120 So. 335, the court let out of the City of Stuart lands separated from the body of the city by a stream, although the boundaries of the city had been defined by the legislature.

The fact that the bonds issued by the Town of North Miami have been judicially validated sets at rest only the validity of the bonds, and the validity of the bonds is conceded in this case. The boundaries of the town, or the inclusion of the lands east of Biscayne Bay, was not adjudged, and was not justiciable, in the validation proceeding. *State* v. *City of Coral Gables,* 114 Fla. 326, 154 So. 234.

In the opinion of Justice Hutcheson it is stressed that acquiescence by the owners of the land situated east of Biscayne Bay in the exercise of municipal jurisdiction was a ground for holding that the municipality was a *de facto* corporation and, therefore, that the lands located east of Biscayne Bay must be held liable for the bonds. We should like to point out that acquiescence (if any such there was) (which means in this case estoppel) does not create rights —it prevents one from asserting a defense—it goes to the remedy, not to the right. This doctrine can give the bondholders no greater rights than they otherwise have. There was no evidence before the court in this cause to show that the bondholders acted or relied upon the failure of the landholders east of the bay to protest against the unlawful inclusion of their lands in the municipality.

While estoppel may work to prevent one from seeking to have declared void an act which is voidable, estoppel can never work so as to make valid that which is absolutely

void. So in this case: The question in *Mahood* v. *State* was whether when the alleged municipality was formed the territory east of the bay was legally included. It was not a detachment proceeding. It was not a petition to the court to prevent the town from exercising jurisdiction over the lands in question *in the future.* It was an inquiry, by what right the alleged Town Officers were assuming to exercise such jurisdiction at all; and the effect of the decision in *Mahood* v. *State,* 133 So. 90, and the following judgment of the trial court was that the Town Officers *never* had any right to exercise jurisdiction over, and hence *never* had any right to tax, the lands east of the bay, because there was no authority of law for the inclusion of those lands within the alleged corporate limits of the town when it was formed. That necessarily means that the lands east of the bay were *never in the town.* It follows that their attempted inclusion was utterly *void.* No estoppel will work to make valid that which is void. Estoppel cannot breathe the breath of life into a dead thing.

State v. *Greer,* 88 Fla. 249, 102 So. 739, 37 A. L. R. 1298.

The court's attention is respectfully invited to the point that this is a suit in equity, and we believe that, as pointed out by Justice Sibley in his dissenting opinion, the equities are with the owners of lands east of the bay and not with the bondholders.

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APPENDIX.

SECTIONS 1825, 1826, 1827, 1828 OF THE REVISED GENERAL STATUTES OF FLORIDA, 1920, PROVIDING FOR THE INCORPORATION OF A TOWN BY MASS MEETING.

"1825. Number of inhabitants necessary to incorporate. —It shall be lawful for the male inhabitants of any hamlet, village or town in this State, not less than twenty-five in number, who shall have the qualifications hereinafter prescribed to establish for themselves a municipal government with corporate powers and privileges as hereinafter provided.

"1826. Distinction between cities and towns.—Whenever any municipal government is established, and it shall appear that there are three hundred registered voters within the limits hereby to be designated, it shall be and the same is hereby incorporated and designated as a city, entitled to the privileges of a city. All municipal governments having a less number of voters than those named above shall be and the same are hereby designated and declared incorporated towns, entitled to the privileges and rights of incorporated towns.

"1827. Publication of notice to assemble and organize.— Whenever any community of persons shall desire to form a municipal corporation under the provisions of this chapter, they shall, for a period of not less than thirty days, cause to be published in some newspaper of the county, or by posting in three places of public resort in the immediate vicinage, a notice requiring all persons who are registered voters, residing in the proposed corporate limits, which shall be stated in this notice, to assemble at a certain time and place to select officers and organize a municipal government.

"1828. Proceedings of meeting.—At the same time and place designated in the notice aforesaid, the qualified electors present, being not less than two-thirds of those whom it is proposed to incorporate, and not less than twenty-five in number, shall select a corporate name and seal for the

municipality which they propose to form, and designate by definite metes and bounds the territorial limits thereof. They shall then proceed to choose by a vote of a majority of the said electors a mayor and not more than nine and not less than five aldermen, who shall be known as the city council, and in whom shall vest the government of the city. There shall also be chosen at the same time and place, and in like manner, a city clerk and a marshal. The mayor, clerk and the marshal shall continue in office for the period of one year from the date of their election, or until their successors are elected and qualified: Provided, That the metes and bounds in this section shall not in any case apply to the fixing or establishing the boundary lines of towns and cities now or heretofore incorporated by the now existing laws of this State."

NOTE.—The opinion of the court and dissenting opinion, in the instant case, will be found at pages 429 and 438 of the certified copy of the transcript of the record of the United States Circuit Court of Appeals and they are not elsewhere reported.